IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

No. 94-251

UNITED STATES OF AMERICA, *Petitioner*

v.

JUAN PAUL ROBERTSON, *Respondent*

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the Racketeer Influenced and Corrupt Organizations Act can be applied to activities that do not have a substantial effect on interstate commerce.

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This amicus brief is filed pursuant to Rule 37 of the United States Supreme Court. Both petitioner and respondent have granted amicus consent to file this brief, and the letters of consent have been filed with the Clerk of the Court.

INTEREST OF AMICUS

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation which currently has a membership of more than 8,000 attorneys and 28,000 affiliate members in 50 states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded over 25 years ago to promote study and research in the field of criminal defense law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's stated objectives is the proper administration of criminal justice. Thus, the members of the NACDL have a vital interest in insuring that the integrity of the federal and state systems of criminal justice are protected. This includes an interest in insuring the proper delineation of the powers that are exercised by the separate federal and state sovereigns against citizens accused of crime.

SUMMARY OF ARGUMENT

The RICO Act was drafted with the goal of reaching those racketeering enterprises whose activities have a substantial effect on interstate commerce. The goal of the RICO Act is not to strike at investments in commerce per se, but to eliminate the infiltration of racketeering into legitimate organizations which operate in interstate commerce. It is a misuse of the statute to apply it to an investment which has only a tangential connection with interstate commerce.

Congress's power pursuant to the Commerce Clause was never intended to be used by the federal government to regulate a local business merely because that business may have some effect on interstate commerce. If this were the proper construction of the commerce clause, virtually no businesses would be immune from regulation or proscription by the federal government. This Court has recognized that Congress's Commerce Clause power only extends to local businesses when they have a substantial and harmful effect upon commerce.

ARGUMENT

THE DECISION OF THE NINTH CIRCUIT SHOULD BE AFFIRMED WHERE THE GOVERNMENT FAILED TO DEMONSTRATE THAT THE ACTIVITIES OF RESPONDENT'S GOLD MINING ENTERPRISE HAD A SUBSTANTIAL EFFECT UPON INTERSTATE COMMERCE AS REQUIRED BY PRIOR DECISIONS OF THIS COURT

In seeking to overturn the decision of the Ninth Circuit below, the United States has sought to have this Court adopt a radical and dangerous interpretation of the Commerce Clause. See U.S. Constitution, Article I, Section 8, Clause 3. In its argument to this Court, the government has advanced a theory of Commerce Clause jurisprudence that threatens to undermine principles of federalism which have been the foundation of our civil liberty; providing the national government with virtually unlimited power to regulate the lives and daily activities of citizens and businesses which have little or no effect upon interstate commerce.

A. The RICO Act Does Not Apply To Investments In Commerce Per Se But Rather To Investments By Organized Crime In Business Enterprises That Operate In Interstate Commerce Or Have A Substantial Effect Upon Interstate Commerce

The parties are in agreement that the basic rule of statutory construction which this Court must apply herein is the principle that the language of a statute "must ordinarily be regarded as conclusive." *United States v. Turkette*, 452 U.S. 576, 580 (1981)(quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); see Gov. Br. p. 10. In this case, the statute in question criminalizes the use or investment of income derived from a pattern of racketeering activity in the "acquisition of any interest in, or the establishment or operation of, any enterprise, which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. 1962(a). According to the United States, this language demonstrates the intent of Congress to exercise its full constitutional authority under the Commerce Clause. A far more natural interpretation of this language, however, is that Congress sought to target only those enterprises that have an effect upon interstate commerce.

This distinction, though subtle, is crucial. Congress could have declared unlawful the investment of income derived from racketeering activity in any enterprise, even enterprises that had absolutely no effect upon interstate commerce. It chose not to. Instead Congress chose to limit RICO's reach to those enterprises that had such an effect.

The government contends that in using the language "engaged in, or the activities of which affect, interstate or

foreign commerce," Congress evinced an intent to exercise its broadest powers under the Commerce Clause. See e.g., *Russell v. United States*, 471 U.S. 858, 859 (1985); *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963); *Polish National Alliance v. NLRB*, 322 U.S. 643, 647 (1944). But the government cites no case that holds that this judicially created rule of construction is to be followed where the statute on its face reflects a different intent.

Title 18 U.S.C. Section 1962 does not make racketeering per se a federal offense. Only where the pattern of racketeering activity is conducted through an enterprise "engaged in, or the activities of which affect, interstate or foreign commerce" is there a crime. 18 U.S.C. 1962(c). Similarly, racketeering activities used as a means to obtain an interest in or control over an enterprise are not unlawful unless the enterprise is "engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. 1962(b). Finally, the investment of income from racketeering activity, even racketeering activity by an enterprise engaged in interstate commerce under 1962(c), is not a crime unless the enterprise is "engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. 1962(a).

Had 18 U.S.C. 1962 made it a crime for a racketeering enterprise (as defined under 1962(c)) to invest racketeering income in any business, then Congress would not merely have expressed an intent "to exercise its full power under the Commerce Clause[,]" *Russell v. United States*, 471 U.S. at 859, but would have actually done so. If anything, the plain language of RICO in this instance reflects a more specific intent.

To whatever extent Congress may have sought to exercise broader powers under other provisions of the

Crime Control Act, those expressions of intent cannot be used to supplant the plain language and structure of the RICO Act. See H.R. No. 1549, 91st Congress, 2d Sess. 70 (1970); Gov. Br. p. 14. To the extent that legislative pronouncements are relevant to this inquiry, this Court should look to the Senate and House reports directed at this particular law. The Senate and House Committee reports which apply specifically to RICO (as opposed to the Crime Control Act overall), state that the purpose of RICO is "the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." S. Rep. No. 617, 91st Cong., 1st Sess. 76 (1969); H.R. Rep. No. 1549, 91st Cong., 2d Sess. 57 (1970), reported in 2 U.S. Code Cong. & Admin. News 4007, 4033 (1970).

In the face of such legislative expressions of intent and in view of the plain language and structure of the act, there is no need for this Court to consider rules of construction which have been developed in other contexts. Contrary to the government's argument, it is plain that RICO does not reach investments in commerce per se. And as we will see from the argument that follows, RICO only applies to investments in enterprises that have a substantial effect upon interstate commerce.

B. Where Congress Has Not Sought To Regulate An Entire Industry, Any Business Activity Sought To Be Regulated Or Proscribed Must Be Shown To Have A Substantial Effect Upon Interstate Commerce

The United States claims that Congressional power to regulate interstate commerce, necessarily extends to "'relatively small and entirely local operation[s].'" Gov. Br.

p 17. This is a serious misreading of this Court's precedents. As this Court observed in *United States v. Darby*, "Congress has sometimes left it to the Courts to determine whether intrastate activities have the prohibited effect on the commerce, as in the Sherman Act. . . . And sometimes Congress itself has said that a particular activity affects the commerce." 312 U.S. 100, 120 (1941). Where Congress has sought to regulate an entire industry which is engaged in interstate commerce, this Court has found it unnecessary for there to be any further demonstration that a local operation within that industry had any particular effect upon interstate commerce. *Id.* On the other hand, where Congress has sought only to regulate or proscribe conduct engaged in by businesses or individuals, an impact upon interstate commerce must be shown. In either case, Congress must indicate or the Courts must find a substantial effect upon interstate commerce.

Wickard v. Filburn, 317 U.S. 111 (1942); *United States v. Wrightwood Dairy Co.* 315 U.S. 110 (1941); *United States v. Darby*, 312 U.S. 100 (1941), are all classic illustrations of this principle. In each case Congress sought to protect entire industries: in the case of *Wickard v. Filburn*, the domestic and international sale of wheat; in the case of *Wrightwood Dairy*, the market price of milk; and in the case of *Darby*, the treatment of workers in all industries. In such instances even purely local activities can have effects nationwide. As this Court observed in *Wickard*, "That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." 317 U.S. at 127-128. Similarly, in *Darby*, this Court stated that, "Congress, to attain its objectives in the suppression of nationwide competition in interstate commerce by goods produced

under substandard labor conditions, had made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It recognized that in present day industry, competition by a small part may affect the whole and the total affect on the competition of many small producers may be great." 312 U.S. at 123.

Even where Congress has acted to the fullest extent of its Commerce Clause power, even where Congress has sought to regulate an entire industry, that power can only be exercised if there is shown that the industry has a substantial impact upon interstate commerce. As this Court has repeatedly stated, "'[T]he reach of that power extends to those intrastate activities which in a substantial way obstructs the exercise of the granted power.'" *Wickard v. Filburn*, 317 U.S. 111, 124 (1942), citing *United States v. Wrightwood Dairy Co.* 315 U.S. at 119 (1941). See also *Scarborough v. United States*, 431 U.S. 563, 571 (1977)(substantial effect required); *United States v. American Bldg. Maintenance Industries*, 422 U.S. 271, 280 (1975)(substantial effect required); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.* 334 U.S. 219 (1948)(substantial effect required); *United States v. Darby*, 312 U.S. at 118 (1941)(substantial effect required). Again, this principle was repeated in *Heart of Atlanta Motel Inc., v. United States*, 379 U.S. 241 (1964) where this Court stated, "[T]he power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the state of origin and destination, which might have a substantial and harmful effect upon commerce." *Id.* at 258.

Plainly, these decisions do not support the government's argument as advanced herein. Were this Court to adopt the government's analysis, few businesses would

be immune from regulation or proscription by the federal government. In today's world it is nearly impossible to engage in any form of business without having some impact upon interstate commerce. The purchase of office supplies and equipment necessarily entails the movement of items across state and national boundaries. The use of telephones invariably involves equipment (such as telephone lines, microwave transmitters, satellites) operating in international commerce. Indeed transmissions intrastate may adversely impact upon the ability of others to send or receive electronic communications interstate. Finally even ordinary and seemingly local banking transactions may have effects or cause the use of instrumentalities operating in interstate commerce.

The United States seeks to expand the reach of the Commerce Clause through the Necessary and Proper Clause. See Article I, Section 8, Clause 18. But it is clear that the founding fathers did not intend that the Necessary and Proper Clause be used to expand the scope of the enumerated powers but only to insure that within the proper exercise of such powers Congress had sufficient means to make them work. Alexander Hamilton went to great lengths to reassure those fearful of its use that this Clause was not intended to destroy local government or exterminate liberty. *The Federalist*, No. 33 at 204 (Jacob E. Cooke ed. 1961). James Madison made a similar argument: "For in every new application of a general power, the particular powers, must always necessarily vary with that object; and be often properly varied whilst the object remains the same. *The Federalist*, No. 44 at 304. Madison made clear that the purpose of this clause was to avoid having to write "a complete digest of laws on every subject to which the Constitution relates." *Id.* As this Court noted in *Maryland v. Wirtz*, "Neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial

impact on commerce as an excuse for broad, general regulation of state or private activities." 392 U.S. 183, 196 n. 27 (1968).

If any impact upon interstate commerce suffices to satisfy the Commerce Clause, the Constitution would place no limit upon the power of Congress to legislate. It would in fact grant Congress the authority to exercise unlimited control over all business activity within the nation. Indeed, the threat posed by the government's theory is not merely an implication which can be drawn from the government's argument. This Court need look no further than the government's citation to the decisions in *United States v. Muskovsky*, 863 F.2d 1319 (7th Cir. 1988), *United States v. Robinson*, 763 F.2d 778 (6th Cir. 1985), and *United States v. Allen*, 656 F.2d 964 (4th Cir. 1981) to see the danger made manifest. See Gov. Br. p. 18-19. In these cases (as well as in the others cited by the United States in its footnote 5) the courts found the interstate nexus satisfied where the enterprise did nothing more than purchase material or supplies or office equipment that originated out of state.

The immense power claimed by the United States does not comport with either the text or purpose of the Commerce Clause. The Constitution gives Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes." U.S. Const. Article. I, Section 8, Clause 3. It does not give Congress the power to regulate commerce *per se* and anything having an effect on commerce.

Significantly, the United States does not contend that Respondent's gold mining operation in and of itself had a

significant effect upon interstate commerce.[1] Instead the United States has chosen to rest its entire argument upon principles this Court has adopted for legislation pertaining to entire industries; principles which have no application to statutory schemes such as that presented herein. Therefore should this Court agree that the government was required to demonstrate that Respondent's operation had a significant effect upon interstate commerce, this Court should affirm the decision of the Ninth Circuit below.

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[1] The government argues that Respondent's mining operation was part of a much larger market in precious metals and that as a result the enterprise, "'[E]ven if 'trivial' when considered in isolation, comes within the reach of the Commerce Clause when it is part of a class of activities that in the aggregate substantially affects interstate or foreign commerce." Gov. Br. p. 19-20. As we have shown above, this argument would only apply if the statute at bar were part of a Congressional effort to regulate an industry itself, such as the mining industry. In such circumstances Respondent's operation, no matter how minimal its impact upon intestate commerce, would fall within the power of Congress to regulate. The government's misapplication of that rule herein would permit the Commerce Clause nexus to be satisfied through simple arithmetic. It is hard to imagine any business activity that is not part of a larger nationwide market. But if that is the test, then "interstate" is no longer part of the Interstate Commerce Clause. The Constitution will be rewritten to authorize Congress to regulate commerce not just "among the several states" but instead "within the several states."

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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